LEGISLATIVE DRAFTING[1]

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THE need for better drafted legislation has been presented frequently and forcibly by prominent lawyers and political scientists. The quantity and quality of our statute law, federal and state, has been the subject of vigorous criticism for many years. There exists a well-founded belief, which found frequent expression at the recent meeting of the American Bar Association, that the popular discontent arising from the tendency of our courts to declare unconstitutional or render ineffective by interpretation legislation enacted to remedy existing social and industrial evils can be traced directly to the fact that much of our so-called social legislation is hastily prepared, ill-considered, and thrown on the statute book without careful study of constitutional limitations, existing statutes, or the phraseology of the principles and rules necessary to give effect to the intentions of its proponents.

The Federal Employers' Liability Act of 1906, enacted to apply only to workmen engaged in interstate commerce, was so inaptly worded that the courts held that it included as well employes engaged in intrastate commerce, and for this reason was unconstitutional.[2] In 1908 the same act was re-enacted in words which precisely limited its effect to workmen engaged in interstate commerce, and in this form it has recently been held constitutional.[3] Senator Sutherland, in a paper before the bar association,[4] expressed the opinion that the decision in the Ives case might have been different if the New York Workmen's Compensation Law [5] had been more carefully drafted.

[1] Read at the meeting of the Academy of Political Science, October 26, 1912.

[2] See Employers' Liability Cases, 207 U. S. 463.

[3] See Second Employers' Liability Cases, 223 U. S. 1.

[4] *American Bar Association Report*, 1912.

[5] Ch. 674 *Laws of 1910;* declared unconstitutional in Ives *v.* South Buffalo Railway Co., 201 N. Y. 271.

The subject of Prof. Reinsch's paper[1] this afternoon emphasizes another need for accurate drafting. If the initiative is to be made a successful method of legislating, means must be provided for the scientific preparation of initiated measures. Bills must be reasonably within the comprehension of the people if they are to be enacted or rejected intelligently. Errors and "jokers" are less likely to be detected by the whole mass of the people than by committees of the legislature, and, if detected, are more dangerous because the bills cannot be amended in the course of discussion and before final action as they could be in the legislature.

My subject is not the need for or the desirability of better drafted statutes, but the means by which they may be had. The scientific preparation of a statute involves:

1. Knowledge of conditions proposed to be regulated, and determination of the exact evils requiring regulation.

2. Determination of the nature of the regulation required and the precise principles or rules which will effect such regulation.

3. Phraseology of the new principles or rules and of necessary administrative provisions in apt and precise language which will fit them into existing principles of constitutional and statute law and make them reasonably clear to the executive and judicial officers who are to enforce them.

So-called practical legislators are fond of dividing these problems into: (1) matters of substance, which are for the legislator, not for the drafter, and (2) matters of form, which may be delegated to the drafter. The distinction, however, is of little value, for changes in phraseology frequently result in changes in policy. Policies determined upon in conference are often hard to recognize when they come from the pen of the drafter. No such division of the problems of preparing legislation is possible. So-called matters of substance and matters of form go hand in hand, and if the problems of legislation are to be solved wisely and effectively, the legislator and the expert drafter must work together.

[1] "Initiative and Referendum," by Prof. Paul S. Reinsch, University of Wisconsin. See p. 203, *infra*.

Prof. John W. Patton, of the University of Pennsylvania Law School, says:

> Legislative action, however, should be based upon demonstrated need, careful study of the proposed remedy in substance, of its constitutionality, of the meaning of every word used in a proposed act, with a careful examination of existing decisions as well as statutes. Knowledge of law as well as of the English language is required, and the pen of one who thinks he has a facility for legislative expression should indeed "make haste slowly."[1]

In workmen's compensation legislation, for example, the legislator, if he performs his legislative duty seriously, must first study existing employers' liability law, and the evils, if any, produced by its operation. He must analyze these evils and consider the possible methods of remedying them, and for this purpose he ought to know and appreciate the methods by which in other states or countries similar evils have been remedied. Having decided that the compensation system offers the best means of doing justice, there remain for his decision important questions of policy involved in working out the details of such a scheme. For example, shall the scheme apply in all employments, in all with certain exceptions, or in certain specified employments selected because of their extra hazard or otherwise? Are all injuries in the course of employment to be compensated, or are certain injuries, such as those caused by an employe's own deliberate act, to be excepted? Upon what basis shall the compensation be computed, and how shall the computation be made, and under what conditions shall it be paid? What shall be the procedure to determine controverted questions? What, if any, administrative organization is required for the proper enforcement of the scheme? Every one of these problems involves the determination of a multitude of detailed questions of policy before the precise limits of the rights and liabilities created by the act are defined in such manner that employer, employe, administrative officer and the court may know when and to what extent the legislature intended that A, an employer, should

[1] "*Festina Lente*," *Penna. Law Rev.*, vol. 59, p. 214.

compensate B, his employe, in case the latter is injured in the course of his employment.

The foregoing are frequently described as questions of policy with which the drafter should have nothing to do; they are solely for the legislator. Theoretically, this is true. If all these questions were carefully weighed and decided by the legislator there would be nothing left for the drafter but to put the legislative decision into language. Practically, however, the great majority of these questions of policy do not occur to the legislator until the drafter in the detailed statement of the legislative intent uncovers the numerous instances to which the legislative intent has not been applied.

Determination of these questions of policy by no means completes the legislative task. There remain questions of constitutionality and the selection of devices, such as the so-called elective scheme, to avoid constitutional restrictions; the adjustment of the statutory scheme decided upon to the existing statute law on the same or similar subjects; and, finally, the selection of the language which will carry the statutory scheme into a statute at once constitutional and effective for the purposes for which it was intended.

Mere phraseology of a statute is itself a difficult task because of the imperfections and inadequacies of language, its unskilful use and the inability of the human mind to foresee all the contingencies which will arise in the daily operation of the law.[1] For this reason it is sometimes said that statutes should declare principles and not go into detail.

If important legislation is to be stated effectively in general principles it can be done only after very careful consideration by the drafters of all questions of detail and the selection of such general language as is suited precisely to the development and application of the general principle to the numerous particular instances to which it will be applied. Otherwise, the act is not truly general; it is simply incomplete.

There is an impression in this country that the English

[1] Compare remarks of F. Vaughn Hawkins, Esq., reprinted in Thayer's *Preliminary Treatise on Evidence*, appendix C, p. 585.

Workmen's Compensation Act is a good example of a well drafted act which states only general principles. In the case of Lysons *vs.* Knowles,[1] Lord Davey, in rendering his opinion in the House of Lords, referred to the act of 1897 as an "extraordinary ill-drawn act," and said:

The difficulty really arises from this—that the draftsman has apparently not worked out on paper into legislative language the scheme which he had in his head, and it looks very much as if the act had really been framed from notes of legislative intention and had not been expanded into the proper legislative language. Cases which have arisen, and cases which are likely to arise, appear not to have been contemplated, but apparently were supposed to be covered by the general language used in the act.

The English Compensation Act of 1897 was expressed in 12½ printed pages; the amended act of 1906 required 24 pages, and in addition there are now more than 150 pages of statutory rules and regulations[2] which have the force of law. Compensation, under the act of 1897, was based on "average weekly earnings"[3] without any indication of the method of computing such earnings. This computation gave rise to so many difficulties in the cases which arose under the act that the drafters of the amended act of 1906 used nearly 400 additional words to explain the method of computing average earnings,[4] a total of 400 words in the place of the 3 words in the original act. The German Insurance Code of 1911 represents a like expansion of the original laws.[5]

The tendency to couch statutes in general terms and to leave details of their administration to executive discretion simply shifts to executive officers the burden of applying the general principle to a particular case. This puts off the difficulty but

[1] 84 L. T. R. 65, vol. 3, Workmen's Compensation Cases (Minton-Senhouse), p. 1 (1901).

[2] The act and rules are reprinted in the appendix to Ruegg's *Employers' Liability and Workmen's Compensation* (1910), pp. 688–868.

[3] First Schedule, sec. 1, b.

[4] First Schedule, section 1, clauses (1) and (2).

[5] See translation in *Bulletin* No. 96 of United States Bureau of Labor.

does not overcome it; for if the law is to be even reasonably clear, executive officers must draft the rules and regulations and prescribe the schedules, reports and records, provision for which has been omitted from the statute. In this country, however, because of the general impression that such rules and regulations, supplementing general statutes, represent an unconstitutional delegation of legislative power, it usually happens that the general principle is applied in hit-or-miss fashion to each particular case as it arises. The New York labor law requires "good and sufficient ventilation" in factories.[1] No specific rules have been prescribed and the act is practically unenforceable.

Moreover, when a general statute is well drawn, the men who have worked out its provisions and selected the language in which to state them are in a better position to state the specific rules for the application of the act to particular instances than are administrative and judicial officers before whom it comes as a totally new and often unconsidered matter. The drafters of a workmen's compensation act, for example, if they have done their work well, ought to know whether free house rent received by an employe is to be included in the computation of his wages for the purpose of determining his compensation in case of injury, and if they fail to state in their act whether it is to be included or not, employers, employes, insurance companies and courts are going to spend a great deal of time in attempting to discover whether the legislature intended to include or exclude this item, and no one is ever going to know what the legislature did intend until some individuals have carried to the court of last resort a case involving the question, and then the chances are even that the court will guess wrong and that the intent of the legislature if it had been expressed would have been directly opposite. For example, take the Sherman anti-trust law, the meaning of which was in doubt for twenty years. There are many people who, if they had been placed in the position of the Supreme Court, would probably have guessed differently as to the Congressional intent.

[1] New York Consolidated Laws, ch. 31, sec. 86.

My point is not that statutes should provide for all conceivable circumstances. I do not expect to see a perfect statute. As was said by Judge Dean: "Laws seem to be born full-grown about as often as men are."[1] But this does not justify putting on to the statute books legislation which is obviously incomplete. The New Jersey Compensation Act[2] bases compensation on wages and contains no definition of the term "wages." The slightest consideration of the operation of this act would disclose to its drafters the absolute certainty that within thirty days of its enactment cases would arise involving the question, "How are wages to be determined?"

It seems foolish to omit such provisions merely to avoid what are called detailed provisions. Indeed, it is generally true that lawyers and other people who attempt to prepare written documents on subjects of which they know little prefer the use of general language, and it usually happens that the more consideration and study one gives to the preparation of a written document the less general language is found in it. Explicitness of language is in direct proportion to the writer's knowledge of his subject matter and its problems.

Commenting on the detail of some statutes, Frederick W. Lehmann, in his President's address before the American Bar Association,[3] cited a Kansas act requiring for each bed in a public inn "clean sheets of sufficient width and length to reach the entire width and length of the bed, and with the upper sheet to be of sufficient length to fold back over the bedding at the upper end or head of the bed," and observed that the drafter forgot to require that the sheet be long enough for tucking in at the foot. These details may seem petty, but suppose that the statute had provided in general terms for sanitary bed coverings, would the administrative officers have carved out of this an enforceable rule which would have effected the purposes of the act, and what would the ordinary judge have said with respect to the meaning and effect of this act had it come before his

[1] In Waters *v.* Wolf, 162 Pa. 167.

[2] Ch. 95, *Laws of 1911*.

[3] *American Bar Association Report*, 1909.

court for application? Would he not have quoted the rule that statutes in derogation of the common law must be construed strictly, and that as the statute said nothing about the length or the breadth of sheets it was not to be interpreted as interfering with individual liberty more than its language absolutely required?

Definitions are helpful in attaining precision, but they must be skilfully used. The New Jersey Compensation Act defines "wilful negligence" as "deliberate act or deliberate failure to act."[1] Literally, this means that a man can escape the charge of negligence only by careless action or inaction.

Blunders in legislative language are varied. They run from the ridiculous to the serious. Congress, for example, enacted: "That no sponges taken from (specified) waters shall be landed, delivered, cured or offered for sale at any port or place in the United States of a smaller size than four inches in diameter."[2] How many of our ports could answer the description of less than four inches in diameter? The Illinois Compensation Act for disfigurement of an employe, grants him one-fourth of *his* compensation in case of death.[3] The second draft of a compensation act, prepared by the Pennsylvania commission, granted compensation to widows of killed workmen, and defined widow to include "only those who are living with the decedent at the time of his death." When it was pointed out that this suggestion of a plurality of wives sounded more like Utah than Pennsylvania, the commission was much impressed with the necessity for a change in the wording, and after retiring into executive session produced the following, which appears in its latest printed draft: The term widow shall include "only a widow living with the decedent at the time of his death."[4] This may relieve the Pennsylvania workman from the insinuation of Mormonism, but if the intent is to give compensation *to the decedent's widow only*, why not say: "shall

[1] Sec. 3, par. 23.

[2] U. S. *Statutes at Large*, v. 34, p. 313.

[3] Act of June 10, 1911, sec. 5, c.

[4] Industrial Accidents Commission of Pennsylvania, 4th draft of compensation act, art. II, sec. 6, cl. 10.

include only the decedent's wife, living with him at the time of his death?"

Language which reads smoothly does not always represent good drafting. As a member of Congress put it, "Like Browning's poetry it may be well said and yet not say anything" to the ordinary reader.

The framers of important legislation should have the benefit of the experience of other states and countries in the same field. They should know the legislation of other states and its operation. Mere copying of foreign legislation will not suffice. Drafters of American compensation acts have repeatedly copied from the English act the words "injuries arising out of and in the course of employment." Apparently, it is assumed that the meaning of these words has been fixed by the English courts and is well understood. Prof. Francis H. Bohlen recently demonstrated [1] that this phrase, instead of having a definite and fixed meaning, is one of the most prolific sources of doubt and litigation in the English act. Mere copying in the Nevada Compensation Act resulted in putting into the very first section an important reference to "the preceding section of this act." [2]

Legislation is constantly enacted in ignorance of existing laws. For example, on February 14, 1903, Congress passed an act transferring the immigration duties of the Secretary of the Treasury to the Secretary of Commerce and Labor.[3] On March 3 of the same year Congress passed an immigration act, in many clauses of which duties were imposed on the Secretary of the Treasury.[4] A joint resolution was subsequently necessary to correct this blunder.[5]

There appears in a congressional appropriation bill an appropriation for publishing the laws in newspapers, although such publication had been expressly prohibited four or five times during the same session.[6]

[1] *Harvard Law Rev.*, vol. 25 (1912), pp. 328, 401, 517.

[2] *Laws of 1911*, ch. 183, sec. 1.

[3] *Statutes at Large*, vol. 32, p. 825.

[4] *Ibid.*, vol. 32, p. 1213.

[5] *Ibid.*, vol. 33, p. 591.

[6] *Ibid.*, vol. 18, p. 349.

In 1912 the New York legislature amended a section of the labor law. Later, at the same session, the same section was again amended without reference to the previous amendment.[1] The question arises whether the amendment incorporated in the first act of 1912, which is not contained in the second amendment of 1912, is or is not part of the labor law of the state?

Another and frequent type of bad drafting is the statement of the same idea in different words in the same act. In one section of the New Jersey Compensation Act there are no less than four different methods of stating the same computation of time.[2]

The obvious suggestion for the correction of many of our political ills, including unscientific statutes, is the election of better men to the legislature. A good legislator, however, is not necessarily a good drafter; and a legislator who is a good drafter is so busy with legislative policies on a host of subjects that he has little time to devote to the wording of laws. Mark Twain said that a man who attempts to study German has not much time for anything else. Drafting statutes is much like learning German.

John Stuart Mill declared: "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws."[3] Our legislators are elected to voice for brief periods the political sentiment of their communities and their attention is largely confined to this field of activity. Having in mind the statement of Mill, it is apparent that the selection of legislators by the elective method does not insure the selection of men of "experienced" minds for making written law; that the frequency of election fails to assure any opportunity for a prolonged experience in lawmaking; and that the nature of the political work which legislators must perform to gain and keep their seats precludes them from and unfits them for "long and laborious study."

[1] *Laws of 1912*, ch. 337 and ch. 543.

[2] *Laws of 1911*, ch. 95, sec. II, par. 15.

[3] *Representative Government*, People's Edition, 1876, p. 39.

Great Britain has solved the drafting problem partially by creating the office of parliamentary counsel, by whom all government bills are drafted. Practical legislators and lawyers in this country have an indefinite notion that the creation of an expert official drafting agency would in some way interfere with the ordinary functions of the legislator. The real function of the legislator is to make known the social need for a given rule of law at a given time. It does not necessarily include the phrasing of that rule. Originally, the English Parliament petitioned the king for the enactment of laws; the king and his counsellors, if the petition were granted, determined the phraseology of the law. Representative legislators elected by popular vote may voice the wishes of their constituents with respect to the general policy which shall govern the community on any particular subject; but, ordinarily, they are not sufficiently skilled in the handling of the English language as an instrument of law-making, and in the knowledge of existing constitutional and statute law, to determine the precise phraseology of the rules which shall make effective the policies so determined upon.

The consequence of using unprecise language in a statute is a loss of that effective control over the policies of legislation which the legislature is empowered constitutionally to exercise to the entire exclusion of both the executive and judicial branches of the government. Moreover, a vast amount of time and painstaking care is expended by administrative officers, lawyers, and courts in the determination of the exact meaning of a statute or of its words or phrases. In all but one or two of the cases which have been litigated under the California Compensation Act during the first year of its operation "the issue was upon the construction of the act and not the fact of disability or the extent of the injury.[1]

The conclusion seems inevitable that every legislative body ought to be supplied with a force of carefully-trained lawyers whose duty it shall be to give attention to these problems before a statute is cast in its final form.

[1] Article by A. J. Pillsbury, member of Industrial Accident Board of California, in *The California Outlook*, Saturday, Oct. 5, 1912.

Definite proposals are now being made to furnish legislatures with expert drafting assistance. Several states, notably Wisconsin and Pennsylvania, have drafting and legislative reference bureaus at the state capitol. At the last session Congress gave serious attention to a bill creating a similar agency at Washington.[1] The American Bar Association has just created a special committee on the drafting of legislation to study existing agencies for the rendering of technical assistance to legislators in the preparation of their laws, and to report its recommendations to the annual meeting in 1913.[2]

Legislative reference libraries are doing excellent work so far as they go, but the drafting end of their work has not been so well developed as the collection and indexing of printed materials. This may be due to the fact that the lawyers are slower than the political scientists in catching up with modern tendencies.

Another device of which frequent use is now being made is to take the preparation of important legislation out of the hands of the regular legislator and entrust it to a legislative commission. This plan may or may not be effective for good. The commission, like many other governmental agencies, depends for its usefulness on the men who constitute it, the time they devote to their work and the men to whom they entrust the actual preparation of their bills. If a skilled workman were to do his work as carelessly and with as many blotches appearing over the whole face of it as appear in some of the compensation acts drafted by commissions, his employer would not hesitate to discharge him without pay or send him back to do his job over again.

The wise solution of this problem of drafting American statutes will do much to relieve administrative officers and courts of

[1] *Congressional Reference Bureau:* Hearings before the Committee on the Library, House of Representatives, Feb. 26th and 27th, 1912. (Published in pamphlet form by Government Printing Office.)

[2] The members of this committee are: William Draper Lewis, Philadelphia, Pa., Chairman; Samuel Untermyer, New York, N. Y.; Louis D. Brandeis, Boston, Mass.; Frederick W. Lehmann, St. Louis, Mo.; Henry C. Hall, Colorado Springs, Colo.; Thomas I. Parkinson, New York, N. Y.; Ernst Freund, Chicago, Ill.

vain efforts to discover legislative intent where there is none, or where it is confused in a mass of ill-chosen words, and will remove one important cause of the discontent which has been made the basis for the proposal of popular recall of judicial decisions affecting the constitutionality of state legislation or the recall of judges rendering such decisions.

I have no panacea for the ills of legislation. I have no scheme to suggest for the production of well-drafted statutes. I know of no device or organization which can be depended upon to provide us with good drafting. Official drafting and legislative reference bureaus are not of themselves sufficient; machinery will not run without power. In the last analysis the problem is to secure men of training and experience who will devote their professional careers to the scientific formulation and development of our written laws. In the words of E. W. Smith, Esq., president of the Pennsylvania Bar Association, the drafting of a statute is not a "pastime for a summer afternoon."[1] In many ways preparation of statutes, because of the increasing quantity and broad effect of our statute law, is even more important than the judicial function which operates only on controversies as they arise between man and man. Again, Mr. Smith says: "Legislation is necessarily fragmentary, unless it is prepared by skilful lawyers, familiar with the subject, who are ready to devote much time and thought to its preparation. But it is foolish to assume that all lawyers can draft statutes. Such work requires a concentration of mind and of expression that few men have." Until we are impressed with the necessity of having our statute law drafted by such men, and until we find the men, we shall continue to find in our session laws numerous examples of legislative blunders, some of them amusing, some pathetic, and unfortunately many of them serious.

[1] *Pennsylvania Bar Association Report*, 1911.